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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION V
RESPONSIVENESS SUMMARY UNITED STATES DEPARTMENT OF ENERGY
FMPC 1990 CONSENT AGREEMENT**

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ENCLOSURE**

DOE

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RESPONSIVENESS SUMMARY

UNITED STATES DEPARTMENT OF ENERGY
FEED MATERIALS PRODUCTION CENTER
1990 CONSENT AGREEMENT

INTRODUCTION

On April 9, 1990, the Regional Administrator of the United States Environmental Protection Agency (U.S. EPA) Region V signed a Consent Agreement with the United States Department of Energy (U.S. DOE) for completion of remedial and removal response actions at the Feed Materials Production Center (FMPC) in Fernald, Ohio. This Consent Agreement was entered into pursuant to authorities of Sections 120 and 106 of the Comprehensive Environmental Response, Compensation and Liabilities Act (CERCLA), 42 U.S.C. §9606(a), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA).

Pursuant to Section XXXV Public Comment of the Consent Agreement, within fifteen (15) days of the signature of the Agreement by U.S. EPA and concurrence by the Attorney General, U.S. EPA would announce the availability of the Consent Agreement for public review and comment. The United States Department of Justice concurred with the Consent Agreement on April 25, 1990. U.S. EPA held a public comment period that extended from May 1 through May 31, 1990. A public meeting was held May 9, 1990, to discuss the Consent Agreement and to accept oral comments.

A summary of each oral and written comment received by U.S. EPA during the public comment period is provided below. U.S. EPA's response to each comment is also provided.

1. COMMENT: The Consent Agreement only addresses issues under Superfund's jurisdiction and does not address other large areas of concern, including the Great Miami River, accidental airborne releases, and the Resource Conservation and Recovery Act (RCRA). A second Consent Agreement must be negotiated and approved together with the first one.

RESPONSE: The environmental and public health impacts of the site on the Great Miami River and airborne releases do fall under the jurisdiction of CERCLA. Hazardous waste requirements of RCRA, if applicable or relevant and appropriate, must be met under Section 121 of CERCLA.

2. COMMENT: The budget provisions of the Consent Agreement are weak; U.S. DOE is only required to make a good faith effort to fund work. The Consent Agreement should require U.S. DOE to include all aspects of the response action, as specific and identifiable items, in budget requests.

RESPONSE: U.S. DOE has a binding commitment to perform the work required under this Consent Agreement. Additionally, it is U.S. DOE's obligation to do all the planning required and take all actions to assure that sufficient funding is available. Due to the nature of the cleanup process, unanticipated findings often arise, but U.S. DOE is required to anticipate that such events will arise and that funds will be needed.

3. COMMENT: Public participation is not adequately addressed by the Consent Agreement. An independent Environmental and Health Monitoring Council should be established, as U.S. DOE did at Rocky Flats and Hanford, to oversee and review the progress of projects.

RESPONSE: Both public participation in the remedial and removal process and community relations are required by CERCLA and these requirements are reflected in the Consent Agreement. U.S. DOE has established a Technical Advisory Committee that is made up of individuals with specific expertise and citizen representatives. The issue of an additional group can be raised at the next remedial investigation/ feasibility study (RI/FS) quarterly information meeting, which is open to the public.

4. COMMENT: U.S. EPA should not have access limited to "all reasonable times," but rather should have access at all times.

RESPONSE: That access is limited to "all reasonable times" is consistent with statutory language pertinent to hazardous waste facilities e.g. see Section 3007(a) of the Resource Conservation and Recovery Act (RCRA).

5. COMMENT: The stipulated penalties are not adequate. The cost of non-compliance may be less than the cost of compliance.

RESPONSE: Due to the nature of the environmental contamination at the site, U.S. EPA agrees that non-compliance with a requirement of the Consent Agreement may be less than a stipulated penalty associated with that non-compliance. U.S. DOE's signature on the

Consent Agreement is an acknowledgement of its obligation to perform the work. If the Consent Agreement is not complied with, U.S. EPA will consider the pursuit of enforcement alternatives, in addition to the collection of stipulated penalties. Additionally, Section 310(c) of CERCLA provides that "any person may commence a civil action on his own behalf" placing jurisdiction in the district court to enforce the standard, regulation, condition, requirement, or order concerned.

6. COMMENT: Labor disputes should not be included under the Force Majeure section of the agreement.

RESPONSE: The Agreement requires that U.S. DOE supply to U.S. EPA in writing the reason(s) for and anticipated duration of delay resulting from a labor dispute, the measures taken and to be taken by U.S. DOE to prevent or minimize the delay, and the timetable for implementation of such measures. A Force Majeure event is subject to agreement of the Parties as to the existence of good cause for an extension as set forth in Section XVIII of the Agreement. Absent that agreement, any extension is subject to dispute resolution, in which case the U.S. EPA Administrator is the final arbiter.

7. COMMENT: The Consent Agreement does not contain any provisions for dealing with the resumption of production.

RESPONSE: U.S. EPA is going to request that U.S. DOE commit in writing to a written notification of initiation of any production activities at FMPC.

8. COMMENT: The site is defined as all areas within the property boundary of the Feed Materials Production Center, any other areas that received or potentially received released hazardous substances, pollutants, contaminants, or hazardous constituents. This would make the Great Miami River and all property contacted by the river at its highest point or future flood stages, and the Ohio and Mississippi River a part of the site. The definition of site should not be changed, but the Great Miami, Ohio, and Mississippi Rivers should be its own operable unit and receive priority for clean up. The use of the Great Miami River for receipt of plant discharges should end, or U.S. DOE should enter into agreements with all States, municipalities, owners, and users from Fernald to New Orleans.

RESPONSE: The site boundary extends to areas suspected of receiving hazardous substances which is emitted or discharged from the site. The site is not extended to areas where the contaminants can not be detected because the contaminants have been so diluted or do not exist in these areas.

9. COMMENT: The site should be cleaned and kept clean.

RESPONSE: U.S. EPA is in strong agreement with this comment, and there is a strong commitment to ensure that the cleanup is properly and thoroughly performed.

10. COMMENT: The comment supports the Consent Agreement because it requires removal actions, remedial action that minimizes delays in implementation, provides for public participation, and transfers authority settling disputes from the Office of Management and Budget (OMB) to the Administrator of U.S. EPA.

RESPONSE: U.S. EPA agrees with this comment, and these conditions strengthen U.S. EPA's oversight role.

11. COMMENT: Changes should be made in the Sampling and Data/Document Availability section to make any new developments or findings simultaneously available to both U.S. DOE and U.S. EPA. U.S. DOE should make quality-assured results available to U.S. EPA within 15 days of their receipt from the laboratory; U.S. DOE shall allow samples or split samples to be taken by U.S. EPA; and U.S. DOE shall notify U.S. EPA ten business days in advance of any sample collection following U.S. EPA's written request to take samples or split samples.

RESPONSE: U.S. DOE is required to present written results to U.S. EPA upon our written request. The current agreement is that U.S. EPA is to receive monthly and quarterly data transfers; out of the ordinary findings are to be communicated by telephone.

12. COMMENT: The Consent Agreement needs to provide for updating Records of Decisions (RODs) as new technology is developed. U.S. DOE needs to continue to research and pursue improved technology after finalization of a ROD.

RESPONSE: U.S. EPA recognizes that new information may warrant rethinking a remedy selected for a site. The National Contingency Plan (NCP) provides for the modification of the Record of Decision in cases where new technology has been developed that would be relevant to the site.

13. COMMENT: The public needs to have access to education opportunities at the beginning of comment periods for EE/CA's, RI's, FS's, and ROD's.

RESPONSE: U.S. DOE has agreed to hold such information meetings during the public comment periods.

14. COMMENT: U.S. DOE should have to notify U.S. EPA and Ohio EPA prior to starting up production.

RESPONSE: U.S. EPA is going to propose a notification requirement to U.S. DOE.

15. COMMENT: Volatile organic compounds (VOC's) or any other hazardous substance found under plant 6, 2/3, or 9 (as part of removal #1) should be treated before discharging effluent to the river.

RESPONSE: U.S. EPA has expressed similar concerns regarding effective treatment for VOC's in a May 8, 1990, letter to U.S. DOE. U.S. EPA required submission of a removal work plan addendum to address the VOC's.

16. COMMENT: The site should be cleaned up. It is difficult for some more elderly residents to attend the meetings, but at the same time want to be kept informed.

RESPONSE: It is U.S. EPA's intention to assure that hazardous substances at the site are addressed. Quarterly newsletters are mailed to interested parties to provide an update regarding the response actions. To add your name to this list, please contact: Dan O'Riordan, U.S. EPA (5PA-14), Superfund Community Relations Coordinator, 230 South Dearborn, Chicago, Illinois 60604, (312) 886-4359 or (800) 621-8431.

17. COMMENT: U.S. DOE must be held fully accountable for meeting both the requirements of CERCLA and RCRA.

RESPONSE: U.S. EPA agrees, and Section VIII of the Agreement expressly states, that the owner and operator of the FMPC must be held accountable for compliance with CERCLA, RCRA, and other applicable environmental statutes.

18. COMMENT: Due to the long time-frames between the ROD's and actual implementation, there needs to be a mechanism for amending the RODS to include new information or technologies. Perhaps the review of remedial actions pursuant to Section XXIX should occur more frequently than "less than five years."

RESPONSE: In accordance with Section XXIX, U.S. EPA will review remedial action no less often than each five years after the installation of final remedial actions to assure that human health and the environment are being protected by the remedial actions being implemented. It is expected that new technologies will become available for the treatment of the types of contamination found at the Fernald site. Section XV of the Agreement provides that U.S. EPA may determine that additional work or modification to work is necessary to accomplish the objectives of the Agreement, subject to dispute resolution. The NCP clearly states that U.S. EPA recognizes that new information may warrant rethinking a remedy selected for a site. U.S. EPA has designed procedures, described in Section 300.435(c) of the NCP, for amending the ROD if it is warranted by new information.

19. COMMENT: Normally, stipulated penalties would be \$25,000 per day under current Federal law. Why does the Consent Agreement reduce the penalty to \$5,000 for the first week and \$10,000 for each additional week?

RESPONSE: Penalties agreed to in the Agreement do not preclude additional penalties under authorities of Sections 310(c) and 109 of CERCLA.

20. COMMENT: If Congress fails to fund the best clean-up plans available to protect the community and the environment, less acceptable plans will be implemented. What is the guarantee that the funding will not dictate the choices made?

RESPONSE: U.S. EPA has final say in the selection of the cleanup options that are to be implemented at the

FMPC. Cost-effectiveness is statutorily mandated. The NCP at 300.430(f)(1)(ii) describes alternatives as "cost-effective" if their costs are "in proportion" to their overall effectiveness (i.e., if the extra cost has some gain in effectiveness). The Agreement necessarily references the Anti-deficiency Act as a limitation, but the statute nor the NCP provides that budget is to be considered in the selection of alternatives.

21. COMMENT: A copy of the monthly U.S. DOE report, as required in Section XXIII, should be available in the public record. Additionally, a summary of the daily wastewater flows and radionuclide concentrations and loadings to the Great Miami River, and an estimate of runoff and radionuclide concentrations to Paddys's Run, should be a part of the administrative record.

RESPONSE: The monthly report and the discharge monitoring reports are required to be a part of the administrative record.

22. COMMENT: The public should be notified if the Consent Agreement is modified or terminated.

RESPONSE: In accordance with Section XXXV, U.S. EPA must follow public notice procedures of Section 117 "Public Participation," of SARA in the event of significant revision of this Consent Agreement resulting from comments received during the 30-day public comment period. Although U.S. EPA would notify the public if the Consent Agreement were modified or terminated in accordance with the terms of the Agreement, U.S. EPA can require such notification by U.S. DOE in the Public Involvement and Response Plan required by Section XXXIV of the Agreement.

23. COMMENT: Does the Consent Agreement reserve the rights of the State of Ohio and/or private citizens to sue U.S. DOE to enforce compliance with applicable federal laws.

RESPONSE: Section XVI of the Agreement provides that the Agreement is enforceable by any person pursuant to Section 310 of CERCLA and that violations are subject to civil penalties under Sections 310(c) and 109 of CERCLA. The State and private citizens are considered persons for purposes of this enforceability provision. The introductory section of this Agreement recognizes

that the State of Ohio has reserved its rights to apply to the Court to bring any further action under Ohio law, to the extent provided by State and Federal law, to compel further cleanup of the facility in the event that Ohio is not fully satisfied by the CERCLA cleanup performed pursuant to the July 18, 1986, FFCA, which this Agreement amends.

24. COMMENT: U.S. DOE has not adequately tested the groundwater in the area south of the FMPC in the area of the South Plume for contaminants other than uranium. U.S. DOE should be required to test groundwater samples from all existing and future wells in the South Plume for all hazardous substance list (HSL) substances found within the FMPC boundary.

RESPONSE: This comment does not specifically address the Consent Agreement, but rather the type of work that is being performed under the Consent Agreement. This area of groundwater contamination is being addressed by both removal action #3 and operable unit #5 of the remedial action.

25. COMMENT: To ensure the completeness of the administrative record, U.S. DOE and U.S. EPA should include all documents relevant to all potential response actions and not limit the record to documents that support selected response actions. It is U.S. EPA's duty to maintain a complete record.

RESPONSE: U.S. DOE is maintaining the administrative record with the oversight of U.S. EPA. U.S. DOE is required to maintain the administrative record in accordance with CERCLA, the NCP, and current U.S. EPA policy and guidance. The requirements for the administrative record are set forth in Subpart I, Section 300.800 et seq. of the NCP. Section 300.810(a)(2) requires that the administrative record file for selection of a response action typically will contain documents containing factual information, data and analysis of the factual information, and data that may form a basis for the selection of a response action. This includes the remedial investigation/feasibility study with an analysis of the potential response actions. The NCP at 300.430(e)(1) provides that the primary objective of the feasibility study (FS) is to ensure that appropriate remedial alternatives are developed and evaluated so that relevant information concerning the remedial action options can be presented to a decision-maker and an appropriate remedy selected (55 Federal Register 8848).

26. COMMENT: The Consent Agreement does not appear to have jurisdiction over the environmental pathways affected by drum storage, air monitoring, or emission controls.

RESPONSE: The Consent Agreement has jurisdiction over releases of hazardous substances, hazardous waste constituents, pollutants, and contaminants from any part of the site.

27. COMMENT: The Consent Agreement should specify actual dollar amount required and U.S. DOE's pledge to spend whatever money is needed regardless of the budget process.

RESPONSE: By signing the Consent Agreement, U.S. DOE committed to performance of the work required therein. U.S. DOE is obligated to fund the entire amount of money necessary to complete this work. Since the cost of the work is not known, it would be disadvantageous to limit the scope of the work by specifying a dollar figure.

28. COMMENT: It is imperative that U.S. EPA be notified prior to the initiation of any production activities at FMPC.

RESPONSE: U.S. EPA has requested that U.S. DOE commit to providing notification prior to initiation of any production activities.

29. COMMENT: There needs to be an educational-type informational meeting at the beginning of any public comment period for documents produced under the Consent Agreement.

U.S. DOE has committed to holding information meetings during public comment periods. U.S. EPA will be participating in these sessions.

30. COMMENT: Labor disputes or a strike should not be an excuse not to comply with the Consent Agreement.

RESPONSE: Labor disputes and strikes are included in the definition of Force Majeure event. As is defined in the agreement, such an event shall mean any event

arising from causes beyond the control of the obligatory party. U.S. DOE has the obligation to assure that the work is performed in accordance with the requirements and time-frames of the Consent Agreement and the work plans submitted therein. The obligation includes the exercise of reasonable diligence to avoid a Force Majeure event.

31. COMMENT: If Westinghouse does not renegotiate a contract to run the plant, the Government may find that no one else may want to run it.

RESPONSE: Because of its remedial and removal response obligations, U.S. DOE will have to have someone staff the facility even if production does not start again. It is a business decision regarding who U.S. DOE contracts to run or maintain the facility. It is U.S. EPA's obligation to assure that U.S. DOE conducts the cleanup in accordance with the terms of the Agreement to meet the purposes of the Agreement as set forth in Section IV.

32. COMMENT: Could a water monitoring device be installed in the Great Miami River to monitor radiation in the river along State Route 128 down to the Miamitown bridge?

RESPONSE: U.S. EPA will evaluate the need and feasibility of installation of such a monitor.

33. COMMENT: Secretary Watkins has stated in a subcommittee hearing that he is going to try to restrict air traffic over the FMPC. Why is this necessary?

RESPONSE: U.S. EPA does not have any information regarding efforts to restrict air traffic over the FMPC. U.S. EPA does not know of any reason why air traffic should be controlled over the FMPC.